FILED
10-29-2020
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2020AP1742

TAVERN LEAGUE OF WISCONSIN, INC., SAWYER COUNTY TAVERN LEAGUE, INC., and FLAMBEAU FOREST INN LLC,

Plaintiffs,

v.

ANDREA PALM, JULIA LYONS, AND WISCONSIN DEPARTMENT OF HEALTH SERVICES,

Defendants-Respondents.

THE MIX UP, INC. (D/B/A MIKI JO'S MIX UP), LIZ SIEBEN, PRO-LIFE WISCONSIN EDUCATION TASK FORCE, INC., PRO-LIFE WISCONSIN, INC., and DAN MILLER,

Intervenors-Plaintiffs-Appellants.

ON APPEAL FROM A NON-FINAL ORDER DENYING TEMPORARY INJUNCTIVE RELIEF, ENTERED IN THE CIRCUIT COURT FOR SAWYER COUNTY, THE HONORABLE JAMES C. BABLER, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANTS-RESPONDENTS ANDREA PALM AND WISCONSIN DEPARTMENT OF HEALTH SERVICES

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INTRODUCTION

Today, Wisconsin is struggling to quell the recent, disastrous skyrocketing of COVID-19 across the State. This skyrocketing has propelled Wisconsin towards hospital capacity, record-breaking daily deaths, and the title of a national COVID-19 hotspot. In response, DHS issued Emergency Order 3 within the well-delineated parameters of Wis. Stat. § 252.02(3), which explicitly authorizes DHS to forbid gatherings of the public to control an outbreak or epidemic.

But as the eyes of the nation watched Wisconsin fight to stem the tide of this viral surge, Intervenors-Plaintiffs asked the circuit court to temporarily enjoin that order. The circuit court did not erroneously exercise its broad discretion in recognizing that Intervenors-Plaintiffs failed to satisfy three of the four required showings to warrant such extraordinary relief.

First, the circuit court did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show that they would suffer irreparable harm absent a temporary injunction. As the circuit court found, Intervenors-Plaintiffs' affidavits failed to even assert that they—or the venues they sought to patronize—were complying with Emergency Order 3 in the first place. Further, the affidavits did not establish a likelihood that Intervenors-Plaintiffs would suffer harm from Emergency Order 3 specifically, as opposed to harm from the COVID-19 pandemic generally. Instead, Intervenors-Plaintiffs made only broad allegations of possibilities. This alone is reason to affirm the circuit court's discretionary decision.

Second, the circuit court similarly did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show that a temporary injunction was necessary to preserve the status quo. A temporary injunction

should not be used to simply obtain the ultimate relief, faster. But that is what Intervenors-Plaintiffs sought, even though they did not even establish compliance with Emergency Order 3. This too is, alone, reason to affirm the circuit court's discretionary decision.

Third, the circuit court did not rely on erroneous legal conclusions in holding that Intervenors-Plaintiffs failed to show a likelihood of success on the merits of their challenge to Emergency Order 3. Their entire argument rests on the incorrect premise that Emergency Order 3 is barred by the Wisconsin Supreme Court's recent decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900. But they misread *Palm*.

Palm analyzed whether agency action taken under two broad, general statutes required rulemaking. Intervenors-Plaintiffs assume that analysis applies when an agency applies the provisions of specific statute like Wis. Stat. § 252.02(3), the provision under which it issued Emergency Order 3. It does not. Where an agency simply carries out the directives of a specific statute, it is not engaged in the policymaking type of action requiring rulemaking.

The circuit court properly recognized that *Palm* did not present the bar that Intervenors-Plaintiffs suggested. In so doing, the circuit court reached a conclusion that a reasonable judge could reach. This Court should affirm the circuit court's denial of Intervenors-Plaintiffs' motion for a temporary injunction.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondents Palm and DHS do not seek publication, but they welcome oral argument if it would assist the Court.

ISSUE PRESENTED

Did the circuit court properly exercise its discretion in denying Intervenors-Plaintiffs' motion for a temporary injunction because Intervenors-Plaintiffs failed to meet three of their four requisite showings to warrant a temporary injunction?

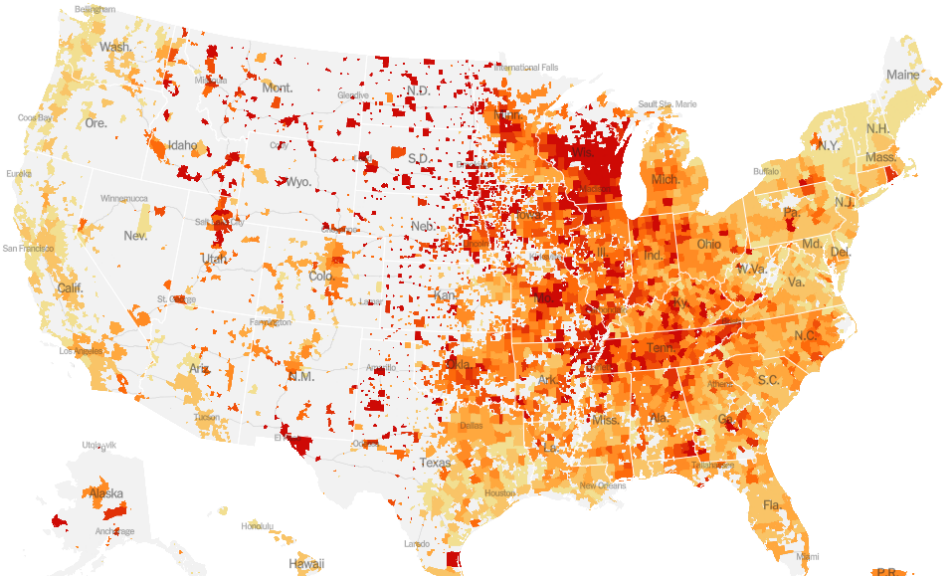
The circuit court denied the motion for a temporary injunction.

This Court should answer yes and affirm.

STATEMENT OF THE CASE: FACTUAL BACKGROUND

I. Wisconsin is a national COVID-19 hotspot: We are experiencing unprecedented case rates and death counts, reaching hospital capacity, and the White House has warned that without mitigation measures conditions will worsen and preventable deaths will occur.

Wisconsin, sadly, is a national COVID-19 hotspot:



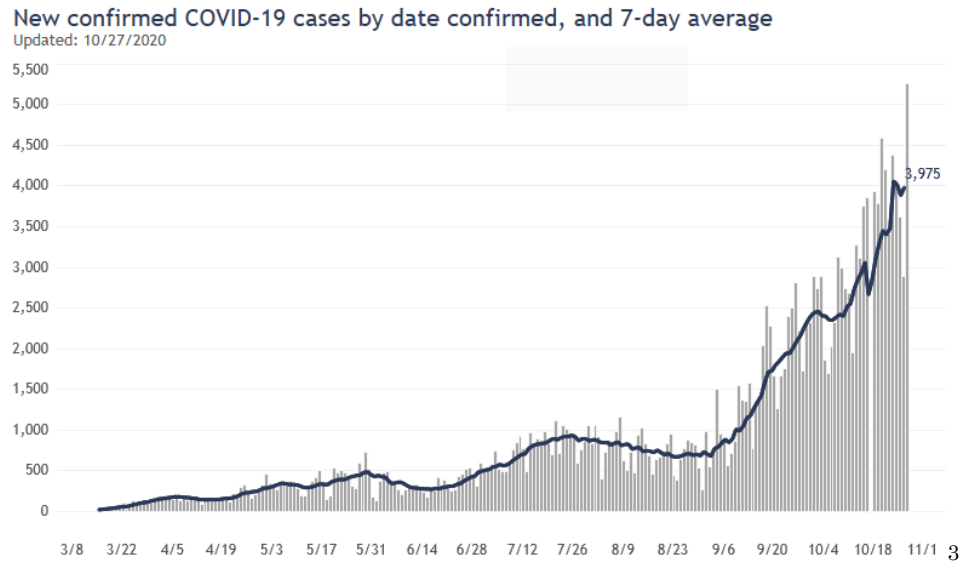
[1]

As cases continue to skyrocket, Wisconsin is in, as one public health official put it, "a nightmare scenario, frankly,

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[1] *COVID in the U.S.: Latest Map and Case Count*, The New York Times, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last updated Oct. 29, 2020) (information updated regularly).

that . . . could get quite a bit worse in the next several weeks or months before it gets better."[2]



[3]

As the above chart shows, over the past two months, Wisconsin has repeatedly shattered its own COVID-19 records, including record deaths counts.[4] In September, the state started to see daily case rates of over 2,000 for the first time. Our average case rate is currently 3,975, more than four and a half times what it was two months ago.[5] On October 21, Wisconsin saw 4,205 new COVID-19 cases; one week later we

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[2] Mitchell Schmidt, *'Nightmare scenario' as Wisconsin again sets records for COVID-19 deaths, cases*, Wisconsin State Journal, https://madison.com/wsj/news/local/govt-and-politics/nightmare-scenario-as-wisconsin-again-sets-records-for-covid-19-deaths-cases/article_cd9002b7-1eb6-5144-a26b-866a8314e1fc.html (Oct. 28, 2020) (quoting Dr. Ryan Westergaard).

[3] Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Cases*, https://www.dhs.wisconsin.gov/covid-19/cases.htm (last updated Oct. 27, 2020) (information updated regularly).

[4] *See* Affidavit of Dr. Ryan Westergaard, (R. 49 ¶¶ 5–18 (describing spread of COVID-19 in Wisconsin and effects on public health resources).) The Westergaard Affidavit is also attached as an exhibit to this brief.

[5] *COVID-19: Wisconsin Cases*, *supra* n. 3.

had 5,262 new cases.[6] Deaths have tracked this unprecedented case surge: as of October 27, the current seven-day *average* of COVID-19 deaths is 31 a day—more than any single-day death count before mid-October.[7]

Wisconsin is quickly approaching hospital-bed capacity. As of October 27, there were 1,385 hospitalized COVID patients and 339 COVID patients in the intensive care unit—both all-time highs, with hospitalizations growing or holding steady in every part of the State.[8] 85% of licensed hospital beds are currently unavailable, with Green Bay- and Fox Valley-area hospitals particularly hard-hit.[9] Aspirus Healthcare in Wausau, for example, has had to place some patients on a waitlist.[10] As the ThedaCare President has explained, approaching hospital capacity does not just endanger COVID-19 patients; rather, it puts anyone at risk

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[6] *Id.* (comparing October 27 and August 27).

[7] Wis. Dep't. of Health Servs., *COVID-19: Wisconsin Deaths*, https://www.dhs.wisconsin.gov/covid-19/deaths.htm (last updated Oct. 27, 2020) (information updated regularly).

[8] Wis. Dep't. of Health Servs., *COVID-19: Hospital Capacity*, https://www.dhs.wisconsin.gov/covid-19/capacity.htm (last revised Oct. 27, 2020) (information updated regularly).

[9] *Id.*; *see also* Mary Spicuzza, et al., *Some hospitals forced to wait-list or transfer patients as Wisconsin's coronavirus surge continues*, Milwaukee Journal Sentinel, (Sept. 30, 2020 7:00 AM), https://www.jsonline.com/story/news/2020/09/30/wisconsin-hospitals-wait-list-patients-covid-19-surge-coronavirus-green-bay-fox-valley-wausau/3578202001; (R. 49 ¶¶ 16–17 (describing Fox Valley hospital capacity at 87.2% full and ICU capacity at 89.5% full as of October 6).)

[10] Madeline Heim, *Community actions must change now to stop the 'tidal wave' of COVID-19 patients pouring into Fox Valley hospitals, health care leaders say*, Appleton Post-Crescent, (Oct. 1, 2020, 1:57 PM), https://www.postcrescent.com/story/news/2020/10/01/wisconsin-coronavirus-fox-valley-hospitals-serious-danger-being-overwhelmed-coronavirus-patients-off/5879574002/.

who may need to be hospitalized for other reasons.[11] Indeed, Wisconsin is so close to hospital capacity that that a field hospital has opened at the Wisconsin State Fairgrounds to treat Wisconsinites who need care for COVID-19.[12]

The recent explosion of COVID-19 cases not only affects the health and lives of Wisconsinites, it also affects the health and livelihood of the Wisconsin economy. As the director of the University of Wisconsin's Center for Research on the Wisconsin Economy recently explained, Wisconsin's economic recovery appears to have slowed, if not reversed, with the recent skyrocketing of COVID-19 cases: "Clearly it's going to depend on how long it takes to get this spike under control and get things back to normal."[13] Put differently, our economy will not be able to recover until Wisconsin gets its COVID-19 spread under control.

II. COVID-19 spreads most easily when members of the public gather indoors where mask-wearing and social distancing are difficult.

COVID-19 spreads mostly via respiratory droplets released when people talk, sing, cough, or sneeze. (R. 49:6.) Accordingly, people are most likely to contract the virus indoors, particularly when social distancing is challenging,

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[11] Heim, *supra* n. 10.

[12] Emilee Fannon, *Gov. Evers activates field hospital as COVID-19 continues Wisconsin surge*, WKOW.com (Oct. 7, 2020, 12:48 PM), https://wkow.com/2020/10/07/gov-evers-activates-field-hospital-as-covid-19-continues-wisconsin-surge/.

[13] Jeff Bollier & Nusaiba Mizan, *As number of COVID-19 cases in Northeast Wisconsin soars, experts worry it could sink state's economic recovery from pandemic*, Green Bay Press Gazette (Oct. 9, 2020, 8:00 AM), https://www.greenbaypressgazette.com/story/money/2020/10/09/wisconsin-businesses-brace-economic-impact-covid-19-cases-soar/3623210001/.

because people are sharing more air than they would outdoors.[14]

COVID-19 spreads easily and invisibly. Many people with COVID-19 will remain asymptomatic (meaning they do not exhibit symptoms) altogether; those who do develop symptoms may not exhibit them until days after contracting the virus. (R. 49:3.) Thus, a person may look and feel completely healthy, but unknowingly be spreading COVID-19.

Epidemiologic studies, case studies of outbreaks, and contract tracing analysis all confirm that crowded indoor settings, especially those with poor ventilation, significantly increase the risk of SARS-CoV-2 transmission. (R. 49:8–11.) For example, a recent analysis of 1,038 COVID-19 cases in Hong Kong between the onset of the virus and April 28, found a large number of positive cases associated with bars. Characterizing the cases into local clusters of transmission, the study found that the largest local cluster of COVID-19, consisting of 106 cases, was traced to four bars.[15] The second largest cluster, consisting of 22 cases, was linked to a wedding and a preceding social event.

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[14] Ctrs. for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Deciding to Go Out*, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html (last updated Sept. 11, 2020).

[15] Adam C. Dillon, et al., *Clustering and superspreading potential of SARS-CoV-2 infections in Hong Kong*, Nature Medicine (Sept. 17, 2020), https://www.nature.com/articles/s41591-020-1092-0; *see also* Yuki Furuse, et al., *Clusters of Coronavirus Disease in Communities, Japan, January-April 2020*, Emerging Infectious Diseases, Ctrs. For Disease Control & Prevention, Sept. 2020, https://wwwnc.cdc.gov/eid/article/26/9/20-2272_article (analysis of over 3,000 COVID-19 cases in Japan, finding 45% of non-healthcare related COVID-19 clusters were associated with restaurants or bars).

Restaurants, bars, and coffee shops pose significant risks because they involve people from different households coming together indoors in situations where mask wearing is difficult. A recent Centers for Disease Control and Prevention (CDC) study found that adults with positive COVID-19 tests were 2.4 times as likely to have reported dining at a restaurant in the 14 days before becoming ill than those with negative COVID-19 tests.[16] When the analysis was restricted to participants without known close contact to a person with COVID-19, individuals who had tested positive for COVID-19 were 2.8 times more likely to report dining at a restaurant, and 3.9 times more likely to report going to a bar or coffee shop, compared to those who tested negative.[17]

The CDC study concluded: "Exposures and activities where mask use and social distancing are difficult to maintain, including going to places that offer on-site eating or drinking, might be important risk factors for acquiring COVID-19."[18] It therefore recommended that, "As communities reopen, efforts to reduce possible exposures at locations that offer on-site eating and drinking options should be considered to protect customers, employees, and communities."[19]

These recommendations were echoed in a report on Wisconsin that the White House Coronavirus Task Force issued on October 11, 2020. The Task Force explained that it

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[16] Kiva A. Fisher et al., *Community and Close Contact Exposures Associated with COVID-19 Among Symptomatic Adults ≥ 17 Years in 11 Outpatient Health Care Facilities—United States, July 2020*, 69 Morbidity & Mortal Wkly. Rep. 1258, 1259 (2020) https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6936a5-H.pdf. A summary of the study is available. *Id.* at 1263.

[17] *Id.*

[18] *Id.* at 1258.

[19] *Id.*

"share[s] the concern of the state health officials that the current situation can continue to worsen. Wisconsin's ability to limit further and avoid increases in hospitalizations and deaths will depend on increased observation of social distancing mitigation measures by the community until cases decline."[20] Included in mitigation efforts, the Task Force explained, should be "avoiding crowds in public and social gatherings in private," "as well as tailored business and public venue measures." The Task force also recommended, in "high incidence jurisdictions," "limiting indoor gathering sizes." "Lack of compliance" with mitigation measures, the Task Force warned, "will lead to preventable deaths."

III. DHS issued Emergency Order 3 to limit gatherings of the public to respond to the skyrocketing of COVID-19 cases, hospitalizations, and deaths in Wisconsin.

With Wisconsin's COVID-19 situation spiraling out of control, DHS Secretary-Designee Palm issued Emergency Order 3 on October 6, 2020.[21] Secretary-Designee Palm did so pursuant to DHS's authority under Wis. Stat. § 252.02(3). (R. 2:13–19.)

Effective from October 8 to November 6, 2020—two incubation periods of COVID-19—the order limits gatherings of the public. (R. 2:15–19.) The order defines public gatherings as an "indoor event, convening, or collection of individuals, whether planned or spontaneous, that is open to the public

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[20] *Report: White House COVID-19 Task Force Concerned About Wisconsin*, CBS 58, (Oct. 15, 2020), https://www.cbs58.com/news/report-white-house-covid-19-task-force-concerned-about-wisconsin.

[21] Wis. Dep't of Health Servs., *EMERGENCY ORDER #3: LIMITING PUBLIC GATHERINGS* (Oct. 6, 2020), https://evers.wi.gov/Documents/COVID19/EmO03-LimitingPublicGatherings.pdf. The order is also in the record. (R. 2:13–19.)

and brings together people who are not part of the same household in a single room." (R. 2:15.)

It provides that in a location where a total occupancy limit exists, gatherings are limited to no more than 25% of the total limit; otherwise, public gatherings are limited to more than 10 people. (R. 2:15.)[22]

It exempts private residences, except in circumstances when an event occurs at a private residence that is open to the public; in that circumstance, the order limits the gathering to 10 people. (R. 2:15.) Emergency Order 3 also provides other exemptions, including for childcare settings, schools and universities, health care and human services operations, Tribal nations, and government and public infrastructure operations (including food distributors). (R. 2:15–18.) Emergency Order 3 further exempts places of religious worship, political rallies, and other speech protected by the First Amendment. (R. 2:16–18.) Emergency Order 3 contains a severability clause. (R. 2:18.)

STATEMENT OF THE CASE: PROCEDURAL BACKGROUND

This case began with a complaint brought by plaintiffs who are not parties to this petition against DHS and DHS Secretary-Designee Palm (hereinafter the "State Defendants"). (R. 2.)[23] The original plaintiffs filed a complaint on October 13, 2020, asking to declare Emergency Order 3 unlawful; specifically, they argued that Emergency Order 3

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[22] The same day that Secretary Palm issued Emergency Order 3, Governor Evers announced over $100 million in grants to help small businesses endure the pandemic. https://content.govdelivery.com/accounts/WIGOV/bulletins/2a4759f.

[23] The State Defendants use the appellate index record numbers, not the circuit court record numbers.

violates the Wisconsin Supreme Court's holding in *Palm*. (R. 2.)

On October 13, the original plaintiffs moved for an ex parte restraining order and temporary injunction. (R. 4; 5.) On October 14, the circuit court, the Honorable John M. Yackel presiding, granted the ex parte motion. (R. 17.) The State Defendants filed a motion for substitution, the original plaintiffs then filed a motion for substitution, and the Honorable James C. Babler was assigned to preside. (R. 14; 16; 32.)

On October 16, Intervenors-Plaintiffs appeared and sought intervention as additional plaintiffs: THE MIX UP, INC., Liz Sieben, Pro-Life Wisconsin Education Task Force, Inc., Pro-Life Wisconsin, Inc., and Dan Miller. (R. 44; 50.) Intervenors-Plaintiffs argued that Emergency Order 3 also harmed them and joined in the request for a temporary injunction. (R. 45; 51; 52.) They adopted the plaintiffs' arguments and too rested on the position that Emergency Order 3 violates the Wisconsin Supreme Court's holding in *Palm*. (R. 51; 52.)

On October 19, the circuit court held a hearing on the motions.[24] The court asked, and the plaintiffs and Intervenors-Plaintiffs affirmed, that they would rely on their submitted affidavits without further evidence as support for their temporary injunction motion. After granting the motions to intervene, it denied the original plaintiffs' and intervenors' motion for a temporary injunction. The circuit

[24] As this Court waived appellate requirements related to production of the transcript, and issued an expedited briefing schedule, no transcript of this hearing is in the record. The State Defendants therefore rely on the Wisconsin Circuit Court Case Access (CCAP) log of the hearing, and recollection from the circuit court's video streaming of the hearing.

court concluded that the movants failed to make three necessary showings.

The court first concluded that the movants failed to show a likelihood of success on the merits. The court noted that the Wisconsin Supreme Court's decision in *Palm* dealt primarily with subsections of Wis. Stat. § 252.02 that are not the basis of Emergency Order 3. It also noted that the Wisconsin Supreme Court did not provide clarity on how its rulemaking analysis applied to subsection (3), the relevant provision here. Rather, the circuit court explained, the *Palm* Court barely discussed that subsection and specifically left in place the provision of the Safer at Home Order that relied on Wis. Stat. § 252.02(3): the provision closing schools.

The circuit court also found that the movants failed to show that (1) a temporary injunction was necessary to preserve the status quo; and (2) that they would suffer irreparable harm absent the injunction. The court stressed that the affidavits the movants relied on did not set forth specific allegations establishing that they had been complying with Emergency Order 3, and in turn did not establish that any harm was the result of Emergency Order 3 specifically, as opposed to the COVID-19 pandemic generally. Notably, during the hearing, the circuit court repeatedly inquired with the plaintiffs and Intervenors-Plaintiffs about these gaps in the evidentiary support they submitted.

The court also denied the movants' motion for a stay of its decision denying the temporary injunction motion.

The circuit court entered an order reflecting its denial of the temporary injunction motion. (R. 59.) Intervenors-Plaintiffs, not the original plaintiffs, then petitioned for leave to appeal, and for an injunction pending appeal. This Court granted both requests and set an expedited briefing schedule.

STANDARD OF REVIEW

Appellate courts "will not overturn a circuit court's denial of injunctive relief absent a showing that the circuit court erroneously exercised such discretion." *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154; *Service Employees International Union, Local 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35. An erroneous exercise of discretion "exists if the trial court failed to exercise its discretion or if there was no reasonable basis for its decision." *Robertson-Ryan & Assocs., Inc. v. Pohlhammer*, 112 Wis. 2d 583, 587, 334 N.W.2d 246 (1983).

That means that if the circuit court has examined relevant facts and applied the proper legal standards using a demonstrated process of reasoning—reaching a conclusion a reasonable court could reach—this Court will affirm the circuit court's exercise of discretion. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 25, 301 Wis. 2d 266, 732 N.W.2d 828.

ARGUMENT

The circuit court did not erroneously deny the motion for a temporary injunction.

Here, three independent bases exist to affirm the circuit court's denial of Intervenors-Plaintiffs' motion for a temporary injunction. The circuit court found that Intervenors-Plaintiffs failed to meet three of their four requisite showings to warrant a discretionary grant of a temporary injunction. So, as long as Court concludes that the circuit court appropriately exercised its discretion as to any of those conclusions, this Court should affirm.

I. A movant must meet four showings to warrant the extraordinary relief of a temporary injunction. Even then, a circuit court still has discretion to deny the request.

Wisconsin Stat. § 813.02(1)(a) provides that a court may grant a temporary injunction where it appears that one party is entitled to judgment, and that another party may take some action during the litigation that could violate rights of the first party, or render the subsequent judgment ineffectual. Temporary injunctions are an extraordinary form of relief, which are not to be issued lightly. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977)

A movant must establish (1) a reasonable probability of ultimate success on the merits; (2) that the injunction is necessary to preserve the status quo; (3) the lack of an adequate remedy at law; and (4) a likelihood of suffering irreparable harm if the injunction does not issue. *Milwaukee Deputy Sheriffs' Ass'n,* 370 Wis. 2d 644, ¶ 20.

"Where the issuance of a temporary injunction would have the effect of granting all the relief that could be obtained by a final decree, and would practically dispose of the whole case, it ordinarily will not be granted unless the complainant's right to relief is clear." *Codept, Inc. v. More-Way N. Corp.*, 23 Wis. 2d 165, 172, 127 N.W.2d 29 (1964).

The granting of a temporary injunction rests within the court's discretion. *Werner*, 80 Wis. 2d at 519. Even if the statutory requirements for have been met, a court need not grant an injunction. *Id.* at 524.

II. The circuit court did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show that irreparable harm would occur absent a temporary injunction.

The circuit court did not erroneously exercise its discretion when it concluded that Intervenors-Plaintiffs failed to show irreparable harm.

Movants have the burden to demonstrate that, without a temporary injunction, the issuance of permanent injunctive relief at the end of the case would be rendered futile. *Werner*, 80 Wis. 2d at 520. Put differently, they must show that without the circuit court acting *immediately* through a temporary injunction, issuing permanent injunctive relief at the end of the case would be meaningless. *Id*. So, for example, if a party raises a challenge related to an upcoming election, the challenger may be able to show irreparable harm based on the fact that—by the time the normal course of litigation will have completed—the election will have already happened, rendering any relief in the party's favor meaningless. *See, e.g., Jones v. McGuffage*, 921 F. Supp. 2d 888, 901 (N.D. Ill. 2013) ("It is self-evident that an otherwise qualified candidate would suffer irreparable harm if wrongfully deprived of the opportunity to appear on an election ballot").

Here, the circuit court properly concluded that Intervenors-Plaintiffs failed to meet their burden because they failed to set forth sufficient evidence that they would be suffer irreparable harm absent a temporary injunction to preserve the status quo. Specifically, the circuit court found that the Intervenors-Plaintiffs' two supporting affidavits failed to connect the dots in two critical respects: the affidavits failed to demonstrate that (1) Intervenors-Plaintiffs were even complying with Emergency Order 3 in the first place, and, relatedly, (2) harm that may occur to Intervenors-

Plaintiffs was the result of Emergency Order 3 itself, as opposed to the COVID-19 pandemic generally.

These findings were not clearly erroneous. First, both Sieben's and Miller's affidavits discussed what would or could happen *if* they had to comply with Emergency Order 3. (*See* R. 46:6 ("If forced to comply with Emergency Order #3, The Mix Up could not operate in its usual manner profitably.")); (R. 47:4 ("If forced to comply with Emergency Order #3, the organizations will have extreme difficulty. . . .")).

This is significant, because to show a likelihood of irreparable harm, Intervenors-Plaintiffs had to demonstrate that if the circuit court did not issue a temporary injunction *now*, any ultimate relief would be futile. Where they failed to show that they were even abiding by the terms of Emergency Order 3 (or, in Miller's case, where he failed to show that the businesses his organizations would seek to patronize were so abiding) in the first place, they failed to show that unless the circuit court took action to enjoin Emergency Order 3 *now*, they would suffer irreparable harm from that order.

Second, and relatedly, both Sieben and Miller's affidavits failed to show a likelihood of harm from Emergency Order 3 *specifically*, as opposed to broad assertions attributable the COVID-19 pandemic more generally. Miller's affidavit asserted that Emergency Order 3's restrictions have made scheduling venues for events "next to impossible," but did not set forth *any* allegations about *any* specific venues his organizations attempted to secure, but could not secure, because of Emergency Order 3. Instead, Miller's affidavit only noted a venue that they *were* able to secure for an in-person event. (*See* R. 47:3.)

Miller's affidavit also failed to set forth any specific allegations about how his organizations would suffer direct financial loss as a result of Emergency Order 3. It generally alleged that the organizations had "many events in the

pipeline but are having much difficulty booking venues that are out of town," and made broad assertions as to why this may be. (*See* R. 47:3–5.) But his affidavit did not offer any specifics as to what, if any, direct financial loss would occur because of the order specifically. (*See* R. 47:3–5.) Instead, Miller's affidavit questioned whether planning in-person events "is even possible" now. Because of the order, or because of COVID-19?

Sieben's affidavit similarly fell short on establishing that harm that would result from Emergency Order 3 specifically, as opposed to COVID-19. She asserted that since October 6, when Emergency Order 3 took effect, The Mix Up "has seen a 50% reduction in sales," (R. 46:6), but at the same time never specifically alleged that The Mix Up *was* complying with Emergency Order 3's terms. Instead, she asserted her belief that Emergency Order 3 led to that 50% decline because she thought customers may not want to drive to a bar and restaurant if it was possible they may be turned away because of occupancy limitations. (R. 46:6.) But, as the circuit court stressed, she presented nothing to show either that she was complying with those restrictions (or would), or that her causal connection was anything more than guess-work—particularly given that it was just as plausible that people were choosing not to patronize a restaurant and bar because of the dangers of so doing during a massive COVID-19 surge. In fact, the reduction is sales appears to be a comparison to a "normal, reasonably busy day," not a day reflecting the "substantial loss of business" that has existed "[s]ince the emergency of COID-19. (R. 46:3, 5–6.)

A plain reading of Intervenors-Plaintiffs' affidavits alleged an impact on business relating to the COVID-19 pandemic, and potential harm that might occur if the venues at issue were to comply with Emergency Order 3. A plain reading of the affidavits does not, however, show any specific

harm that would likely result to Intervenors-Plaintiffs from Emergency Order 3 absent a temporary injunction.

Before this Court, Intervenors-Plaintiffs newly suggest that they will suffer irreparable harm as taxpayers because their tax dollars go towards the creation and enforcement of Emergency Order 3. (The Mix Up Br. 36–37.) But this half-hearted attempt fails. To start, that argument would seemingly apply to every challenge to every government action, though a temporary injunction is the rare exception, not the rule.[25] They do not even try to show that somehow their status as taxpayers means that unless the court granted a temporary injunction, final relief in their favor would be meaningless. And even if they had, which they have not, they would need to have developed those facts in the circuit court. They did not do so; rather, both affidavits simply alleged that the respective individuals and entities pay taxes generally—nothing more. (R. 46:4.)

The question before this Court is whether the circuit court hear reached a conclusion that a reasonable judge could reach. *Kocken*, 301 Wis. 2d 266, ¶ 25. With so many gaps left unanswered by Intervenors-Plaintiffs' affidavits, the answer is yes. This alone is sufficient grounds to affirm the circuit court's ruling.

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[25] For similar reasons, in order to have standing to bring a legal challenge based on taxpayer status, "it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, *some pecuniary loss*; otherwise the action could only be brought by a public officer." *S.D. Realty Co. v. Sewerage Comm'n,* 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961) (emphasis added).

III. The circuit court did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show that a temporary injunction was necessary to preserve the status quo.

Second, the circuit court also did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show that a temporary injunction was necessary to preserve the status quo.

Importantly, the status quo prong reflects that the object of a temporary injunction is not to "change the position of the parties or to require the doing of an act which constitutes all or a part of the ultimate relief sought." *Shearer v. Congdon*, 25 Wis. 2d 663, 667, 131 N.W.2d 377 (1964) (citation omitted). Requiring that a movant show that the temporary injunction is necessary to preserve the status quo helps distinguish the need for immediate action from simply obtaining faster relief on the ultimate merits, as the purpose of a temporary injunction is "not to decide the action before trial." *Id.*

Here, the circuit court also properly recognized that the Intervenors-Plaintiffs failed to show that a temporary injunction was necessary to preserve the status quo. Indeed, the Intervenors-Plaintiffs did not show that they (or the venues they sought to patronize) had been complying with Emergency Order 3, or intended to do so. Instead, Intervenors-Plaintiffs simply sought their ultimate relief, *faster*.

The Intervenors-Plaintiffs' suggest that the circuit court erroneously exercised its discretion because it, at times—prior to clarification—stated that Emergency Order 3 was a 60-day order. (The Mix Up Br. 16–17.) But counsel brought this to the court's attention at the hearing, and the circuit court further explained—but did not change—its rulings. Thus, they cannot allege that the circuit court rested

its determination on an inaccurate understanding. They simply disagree with the circuit court's exercise of discretion.

Because the circuit court did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to satisfy the status quo prong necessary to warrant a temporary injunction, the circuit court did not erroneously exercise its discretion in denying the motion for a temporary injunction.

IV. The circuit court did not erroneously exercise its discretion in concluding that Intervenors-Plaintiffs failed to show a likelihood of success on the merits.

In addition to its proper exercise of discretion on the necessary irreparable harm and status quo elements, the circuit court properly exercised its discretion in concluding that Intervenors-Plaintiffs failed to show a likelihood of success on the merits of their challenge to the legality of Emergency Order 3. Rulemaking is not required when an agency is executing authority that is well-delineated in a statute, and Wis. Stat. s. 252.02(3), on which Emergency Order rests, is such a statute.

Plaintiff-Intervenors rely on *Palm*, but that decision addressed a different question about when rulemaking is required under Wis. Stat. ch. 227. Indeed, *Palm* exempted DHS action under Wis. Stat. § 252.02(3), the provision authorizing Emergency Order 3 here, from its rulemaking holding and rationale.

Here too, the question is whether the circuit court applied the proper legal standards to reach a decision that *any* reasonable judge could reach. *Kocken*, 301 Wis. 2d 266, ¶ 25.

A. Rulemaking is not required when an agency executes well-delineated statutory authority.

Administrative rulemaking requirements are grounded in separation of powers principles. Under those principles, the legislative branch determines policy choices in the first instance pursuant to the constitutional grant of the legislative power of the state, Wis. Const. art. IV, § 17. Following the enactment of a law, the executive branch thereafter has the authority to execute it. Wis. Const. art. V, § 4.

Although the executive can only execute the laws that the Legislature has enacted, it nonetheless has broad authority to interpret the law and to exercise judgment and discretion in carrying out the executive function:

> The executive must certainly interpret and apply the law; it would be impossible to perform his duties if he did not. After all, he must determine for himself what the law requires (interpretation) so that he may carry it into effect (application). Our constitution not only does not forbid this, it requires it.

Tetra Tech EC, Inc. v. Wisconsin DOR, 2018 WI 75, ¶ 53, 382 Wis. 2d 496, 914 N.W.2d 21.

It is "one of the axioms of modern government" that "a legislature may delegate to an administrative body the power to make rules." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). The legislative power to make laws includes delegations to "administrative agencies [of] such legislative powers as may be necessary to carry into effect the general legislative purpose." *Clintonville Transfer Line v. Pub. Serv. Comm'n*, 248 Wis. 59, 69, 21 N.W.2d 5 (1945).

Chapter 227 recognizes such delegations. "In creating agencies and designating their functions and purposes, the legislature may delegate rule-making authority to these agencies to facilitate administration of legislative policy." Wis. Stat. § 227.19(1)(b).

Under these principles, agencies need not undertake rulemaking every time they act under the statutes they are charged with executing. They must promulgate rules only when the relevant authorizing statute itself contains gaps that must be filled in. *See Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 228, 240 N.W.2d 403 (1976) ("When a statute is plain and unambiguous, no interpretation is required . . . ."); *cf. Lamar Cent. Outdoor, LLC v. DHA*, 2019 WI 109, ¶ 24, 389 Wis. 2d 486, 936 N.W.2d 573 (2019) (holding that rulemaking is required when an agency changes its interpretation of an ambiguous statute, but not when it conforms its interpretation to an unambiguous statute).

In deciding whether an agency action is an executive application of a statute or an exercise of the delegated legislative power of rulemaking, courts look to the definition of a "rule" in Wis. Stat. § 227.01(13). That definition provides that a rule must be "(1) a regulation, standard, statement of policy or general order; (2) of general application; (3) having the force of law; (4) issued by an agency; (5) to implement, interpret or make specific legislation enforced or administered by such agency [or] to govern the interpretation or procedure of such agency."

As to the fifth element, all of those terms ("implement, interpret, or make specific") have something in common: they go to the metes and bounds of the law, or how the law will be enforced in the future. *Citizens for Sensible Zoning, Inc. v. DNR*, 90 Wis. 2d 804, 816, 280 N.W.2d 702 (1979). Understood in its statutory context, the term "implement" covers an agency's prospective enforcement and application of its statutory powers and duties. *See* Implement, *Oxford English Dictionary* (2d ed. 1989) ("To complete, fill up, supplement"); *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of

surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.").

In the context of what constitutes a rule, "implement" accordingly refers to the implementation of the law *as a whole*. The same is true of the related terms in the fifth element of the definition of rule: "interpret or make specific"—terms that are necessarily forward-looking. In other contexts, the term "implement" is sometimes defined differently. The Wisconsin Supreme Court, for example, recently observed that, in contrast to implementing the law as a whole, when an executive agency carries out (or "implements") a specific legislative mandate or direction, it is engaging in an executive action. *See SEIU*, 393 Wis. 2d 39, ¶ 20 n. 6.

A rule thus implements a statute by setting forth how the statute will be interpreted and applied in contingent future circumstances. In contrast, when an agency simply applies or enforces a statute that permits a specific action to be taken in the determinate factual circumstances of the present, it is not articulating future agency policy, but rather is executing the law—a function that does not require rulemaking.

That distinction is also consistent with Wis. Stat. § 227.10(1), which requires that "[e]ach agency shall promulgate as a rule each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Under that standard, too, an order issued by an agency must be promulgated as a rule only if it is either a statement of general policy or an interpretation of the agency's authorizing statute adopted by the agency to prospectively govern its enforcement or administration of that statute. In contrast, an agency order does not have to be promulgated as a rule if it does not set general policy or prospectively govern future agency actions, but merely interprets a statute to the extent necessary to execute it in a present factual situation.

B. Wisconsin Stat. § 252.02(3) provides DHS with a defined power to close schools and forbid public gatherings to control outbreaks and epidemics.

The subsection at issue here, Wis. Stat. § 252.02(3), requires DHS only to apply or enforce a statute that permits a specific action to be taken in the determinate factual circumstances of the present. It provides, in full: "The department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics."

C. Emergency Order 3 constitutes executive action under well-delineated statutory parameters.

Emergency Order 3 order comports with the plain language of DHS's authority under Wis. Stat. § 252.02(3), and is an executive action under well-delineated statutory parameters. It is not a rule.

Wisconsin Stat. § 252.02(3) explicitly provides DHS with authority to "forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics." "*Public* gatherings" means gatherings of the public. Subsection 252.02(3) describes public gatherings as happening in churches, and obviously churches are not publicly owned. And the "other places" language, read in context of a statute designed to "control outbreaks and epidemics," is properly read as a place where a virus may easily spread. Notably, both schools and churches—enumerated before "other places"—are places where individuals from different households come together in close proximity indoors.

Emergency Order 3 accordingly fits well within the parameters of DHS's authority under the plain language of Wis. Stat. § 252.02(3). Emergency Order 3 "forbids public

gatherings" in places where persons from different households will be together in close proximity indoors. It applies only to indoor gatherings that are open to the public and bring together people who are not part of the same household.

Additionally, by prohibiting public gatherings of over 25% total occupancy if applicable, or over 10 persons if not, DHS "forbid[s]" public gatherings of larger groups. Where the plain language of the statute permits DHS to forbid public gatherings in order to "control outbreaks and epidemics," a prohibition of gatherings above a certain person threshold necessarily serves to "control outbreaks." Wis. Stat. § 252.02(3). Thus, Emergency Order 3 comports with the plain language of Wis. Stat. § 252.02(3).

This executive action—a prompt reaction to the skyrocketing of COVID-19 cases across Wisconsin—is not a rule within the meaning of Chapter 227. Most significantly, it does not "implement, interpret, or make specific legislation enforced or administered" by DHS. *See* Wis. Stat. § 227.01(13).

Under the plain-language parameters of Wis. Stat. § 252.02(3), Emergency Order 3 forbids gatherings of the public to help control the recent devastating COVID-19 surge. The only decision DHS had to make was to determine whether and how to forbid public gatherings to control this particular epidemic. That is a core executive function that cannot be overridden to a legislative veto through rulemaking procedures.

D. Emergency Order 3 comports with *Palm*.

Intervenors-Plaintiffs fail to consider whether the plain language of Wis. Stat. § 252.02(3) required interpretive rulemaking by DHS. Instead, they focus on *Palm* and assume that the analysis there, which the court applied in the context

of different subsections of Wis. Stat. § 252.02, must apply to agency action under subsection 252.02(3), as well. But that assumption skips the threshold question of evaluating whether rulemaking is required: whether the underlying statutory provision is so open-ended as to necessitate rulemaking to begin with. The *Palm* court, in upholding the school closure provision of Safer at Home, recognized that section 252.02(3) is not such a provision.

1. *Palm* addressed whether DHS action under open-ended provisions, Wis. Stat. §§ 252.02(4) and 252.02(6), was a rule—not action under s. 252.02(3).

Palm addressed the enforceability of Emergency Order 28, the Safer at Home Order issued by DHS. Various provisions of that order relied on DHS's authority under Wis. Stat. §§ 252.02(3), 252.02(4), and 252.02(6).[26] The *Palm* court concluded that most provisions in the Safer at Home order were invalid because they had not been promulgated as a rule. But that analysis discussed DHS's authority under Wis. Stat. §§ 252.02(4) and 252.02(6), not s. 252.02(3). *See generally Palm*, 391 Wis. 2d 497. ¶¶ 15–59.

Subsections 252.02(4) and 252.02(6) provide DHS with more general, less delineated authority. Wisconsin Stat. § 252.02(4) provides that DHS may "promulgate and enforce rules or issue orders" (1) to "guard against the introduction of any communicable disease into the state"; (2) "for the control and suppression of communicable diseases"; (3) "for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease," and (4) "for the sanitary care of jails, state prisons,

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[26] Emergency Order 28, the Safer at Home Order, is available online at: https://evers.wi.gov/Documents/COVID19/EMO28-SaferAtHome.pdf.

mental health institutions, schools, and public buildings and connected premises." And Wis. Stat. § 252.02(6) provides, without further specification, that DHS "may authorize and implement all emergency measures necessary to control communicable diseases." Examining the orders that rested on those subsections, the court determined that most were a "general order of general application" under Wis. Stat. § 227.01(13). 391 Wis. 2d 497, ¶¶ 22–30. The court found that because Safer at Home was a statewide order that applied to a class that could change or grow over time, it was a general order of general application. *Id.*[27]

For DHS to issue Safer at Home under the more general provisions of §§ 252.02(4) and 252.02(6), DHS first had to fill in the statutory gaps and make affirmative broad determinations. The court found that Safer at Home fell within Wis. Stat. § 227.01(13)'s definition of a rule because it involved DHS's interpretation of the kinds of action it was empowered to take under the open-ended grants of power in Wis. Stat. §§ 252.02(4) and (6). DHS's action went beyond applying the law and required it to interpret the law to determine what type of action it could take. *See Palm*, 391 Wis. 2d 497, ¶¶ 31–35.

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[27] This argument does not require this Court to reach any holding in conflict with *Palm*. The *Palm* decision is controlling on this Court only as to the question of whether the Safer at Home order issued under subsection 252.02(4) and (6) was a "rule" under Wis. Stat. § 227.01(13). That holding does not control the result here because Emergency Order 3 did not require rulemaking for separate, additional reasons.

Defendants-Respondents, note, however, that that holding was based on an erroneous conclusion of law. Safer at Home was a response to a specific and particular fact scenario, not a general order of general applicability. Defendants-Respondents simply note this disagreement to preserve the argument on appeal that Emergency Order 3 is also not a rule because it is not a general order of general applicability.

Justice Kelly addressed this point at length in his concurring opinion, finding that Safer at Home involved legislative action because it made ex ante "public policy decisions" about DHS's authority. *Id.* ¶ 110 (Kelly, J., concurring, joined by R. Bradley, J.). Specifically, he reasoned that DHS was interpreting the law by announcing policy decisions that DHS had "the authority to confine people to their homes" or "to close private businesses, or forbid private gatherings, or ban intra-state travel, or dictate personal behavior." *Id.* He noted that if these policy decisions were embedded in the statute, then the Safer at Home provisions—even the most far-reaching measures confining individuals to their homes—could be justified as the exercise of executive authority. *Id.* ¶ 116; *see also id.* ¶ 112 n. 8 (noting that "Justice Hagedorn's statutory analysis might be perfectly serviceable if we were considering an executive order implementing previously established public policy decisions").

The same was not true for DHS action under the defined parameters of Wis. Stat. § 252.02(3). Wisconsin Stat. § 252.02(3) left no policy decisions to be made, and the court's rulemaking analysis did not discuss DHS's authority under § 252.02(3). The action taken under that subsection, school closures, fell squarely under Wis. Stat. § 252.02(3)'s plain directive for DHS to "close schools" to protect against communicable diseases. The court left that provision in place. *Id.* ¶ 58, n.21 ("This decision does not apply to Section 4. a. of Emergency Order 28.").

Thus, the *Palm* Court's omission of Wis. Stat. § 252.02(3) from its analysis makes sense. Indeed, to have held otherwise as to school closures would have violated separation of powers principles by in essence creating a legislative veto of executive action—by paralyzing the executive branch from actually executing the statute.

In addition to specifying the types of actions DHS may take, Wis. Stat. § 252.02(3)—unlike the broader, less

delineated provisions of Wis. Stat. § 252.02 in focus in *Palm*—also sets forth the set of temporary circumstances in which DHS may take those specified actions. Accordingly, Wis. Stat. § 252.02(3) has inherent temporal parameters. Courts describe administrative rules as "rules of the road" that will apply without a built-in expiration. *See Sensible Zoning, Inc., v. DNR*, 90 Wis. 2d at 814–15 (flood plain zoning ordinance applied to anyone moving forward who acquired legal interest in the subject land); *Cholvin v. DHFS*, 2008 WI App 127, ¶¶ 24–25, 313 Wis. 2d 749, 758 N.W.2d 118 (instruction to determine new applicants eligibility for a certain Medicaid program applied to all applicants moving forward). The *Palm* majority viewed Safer at Home as not limited in time and thus like rules that go forward without expiration. *See Palm*, 391 Wis. 2d 497, ¶ 27 ("[A] 'limited-in-time scenario" is not the power that Palm has seized.")

But subsection 252.02(3)'s plain language bakes in a temporal limitation: it allows DHS to act only "to control outbreaks and epidemics," i.e., to discrete situations. That means that orders issued under subsection 252.02(3) necessarily cannot be ongoing rules of the road. It would not be possible to promulgate a "rule," with its inherent ongoing viability, that would satisfy the language of subsection 252.02(3).

The well-delineated parameters of Wis. Stat. § 252.02(3) demonstrate why the *Palm* Court exempted Wis. Stat. § 252.02(3) from its analysis and holding.

2. *Palm* did not hold that all DHS action under s. 252.02 requires rulemaking.

Intervenors-Plaintiffs argue that any statewide order issued by DHS must be subject to rulemaking. In doing so,

they beg the question of whether the underlying statute, subsection 252.02(3), requires rulemaking to begin with.[28]

Intervenors-Plaintiffs repeatedly excerpt a quotation from *Palm* to suggest the Court said something it fundamentally did not say. Intervenors-Plaintiffs assert: "*Palm* held—in entirely unambiguous terms—that 'no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule.'" (The Mix Up Br. 20; *see also* 3, 30 (quoting *Palm*, 391 Wis. 2d 497, ¶ 30).) Intervenors-Plaintiffs offer this language as a holding that *any* statewide DHS action under Wis. Stat. § 252.02 constitutes a rule.

That is incorrect. The excerpted quotation comes from a paragraph discussing the fact that "Wis. Stat. § 227.01(13)(a)–(zz) contains 72 specific exemptions from the definition of 'Rule'. The exemptions are extraordinarily detailed." *Palm*, 391 Wis. 2d 497, ¶ 30. The court noted that some exemptions apply to DHS—for example, the computing or publishing of the number of nursing home beds—and some relate to "orders." *Id.* The Court then concluded: "However, despite the detailed nature of the list, and the Legislature's consideration of acts of DHS and its consideration of 'orders,' no act or order of DHS pursuant to Wis. Stat. § 252.02 is exempted from the definition of 'Rule.'" *Id.*

In pointing out that DHS action under Wis. Stat. § 252.02 was not specifically exempted from the statutory definition of a rule, the court did not say that every action

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[28] In the memorandum Intervenors-Plaintiffs emphasize, the Legislative Reference Bureau made the same mistake as Intervenors-Plaintiffs of failing to consider the threshold question of whether rulemaking would be required for action under Wis. Stat. § 252.02(3). (*See* The Mix Up Br. 9.) Notably, instead of starting with the statute at issue and Wis. Stat. § 227.01(13)'s definition of a rule, the memorandum instead looked only at whether, under *Palm*, Emergency Order 3 is a general order of general applicability.

DHS takes pursuant to Wis. Stat. § 252.02 *is* a rule. If that were the case, there would have been no need for the entire remainder of the court's rulemaking analysis. On the contrary, the court specifically held that it was not "defin[ing] the precise scope of DHS authority" under Wis. Stat. § 252.02 because Safer at Home "clearly" "went too far." *Id.* ¶ 55.

Agencies need not undertake rulemaking every time they act under the statutes they are charged with executing, and DHS acted under the well-delineated parameters of Wis. Stat. § 252.02(3). To say that DHS must first engage in rulemaking before acting under the well-delineated scope of Wis. Stat. § 252.02(3) would be—as Justice Hagedorn warned in *Palm*—to turn our "constitutional structure on its very head" by "subjecting executive branch enforcement of enacted laws to a legislative veto." *Palm*, 391 Wis. 2d 497, ¶ 218 (Hagedorn, J., dissenting).

Intervenors-Plaintiffs improperly ask to treat *any* statewide executive discretion in applying Wis. Stat. § 252.02(3) as rulemaking. *Palm* did not so hold.

3. *Palm*'s ruling as to Safer at Home provisions relating to private gatherings do not control the result here.

Intervenors-Plaintiffs also claim that since part of a Safer at Home provisions struck down in *Palm* included capacity limitations, then all capacity limitations must involve legislative action requiring rulemaking. They mistakenly assert that under the State Defendants' position here, DHS could have reissued all of the capacity limitations from Safer at Home by "simply copying and pasting those limits into a new order." (The Mix Up Br. 2.)

But the difference between the limitations in Emergency Order 3, and those rejected in Safer at Home, is straightforward: the Safer at Home restrictions were not

limited to gatherings of the public; rather, they prohibited "private gatherings of any number of people who are not part of a single household." *Palm*, 391 Wis. 2d. 497, ¶ 2; *see also id.* ¶ 110 (finding Safer at Home involved legislative action by making public policy decisions, including determination that DHS had "power to . . . forbid private gatherings . . .") (Kelly, J., concurring). Additionally, the other provisions in Safer at Home that related in some way to public gatherings explicitly extended to private events, regardless of the number of persons, or completely closed venues.[29]

Emergency Order 3, on the other hand, forbids only public gatherings. That difference is significant, because the plain language of Wis. Stat. § 252.02(3) explicitly authorizes DHS to forbid "public gatherings" to control an outbreak. And it authorizes DHS to do so in "other places" (beyond schools and churches) where the public may gather.

4. DHS's determinations as to how to apply Wis. Stat. § 252.02(3) do not make it a rule.

Intervenors-Plaintiffs also advance an all-or-nothing approach in interpreting DHS's authority under s. 252.02(3): that DHS could forbid *all* public gatherings or close *all* schools without going through rulemaking, but may not undertake lesser measures. Indeed, it is DHS's discretion in executing Wis. Stat. § 252.02(3) that Intervenors-Plaintiffs primarily point to as improper. (*See* The Mix Up Br. 3) (challenging "subjective, statewide policy judgments"). Put differently, to Intervenors-Plaintiffs, DHS action became a rule in violation of *Palm* the minute DHS used any discretion in deciding how to execute the statute it is plainly authorized to execute.

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[29] *See* Safer at Home, *supra* n. 26, § 3 (ban on public and private gatherings), *id.* § 4.c–d (closing places of amusement and activity, and salons and spas), *id.* § 13d–e (closing restaurants and bars).

Therefore, to Intervenors-Plaintiffs, the only way DHS could act quickly and meaningfully, is an across-the-board action with no discretion at all.

That theory is wrong on multiple fronts.

To start, such an interpretation ignores the text of the law. Wis. Stat. § 252.02(3) does not say DHS may close *all* schools and forbid *all* public gatherings; it says that DHS may "close schools, and forbid public gatherings. . . to control outbreaks and epidemics."

Second, Intervenors-Plaintiffs' theory ignores that the executive branch must make determinations about how to apply the laws it is charged to carry out. "The executive . . . is not a legislatively-controlled automaton." *SEIU*, 393 Wis. 2d 38, ¶ 96. When an agency exercises discretion in applying the law, it "is intrinsic to the very nature of executive authority." *Id.*

The Wisconsin Supreme Court has long made clear that the Legislature cannot interject itself when the executive exercises discretion in applying or enforcing the law. *See, e.g. Tetra Tech*, 382 Wis. 2d 496, ¶ 53. Very recently, the Court held improper legislative interference in guidance documents, as they involve a core executive function. *SEIU,* 393 Wis. 2d 38, ¶¶ 104–08. The court warned that "[i]f the legislature can regulate the necessary predicate to executing the law, then the legislature can control the execution of the law itself," which would "demote the executive branch to a wholly-owned subsidiary of the legislature." *Id.* ¶ 107.

Further, Intervenors-Plaintiffs' reading would lead to absurd results. It would require DHS to take more action than necessary to actually control the outbreak (as it is tasked to do under the statute's plain language). Under Intervenors-Plaintiffs' interpretation, if a dangerous strain of strep throat broke out in elementary schools across Wisconsin, for example, DHS *could* issue an order closing every school in

Wisconsin to combat the outbreak without rulemaking, but could *not* issue an order closing only elementary schools.

Intervenors-Plaintiffs' reading would also lead to the absurd result that only *less* invasive government actions require rulemaking. For example, if DHS forbade public gatherings in a select number of counties to quell a localized outbreak, or closed elementary schools in the face of a disease afflicting very young people, that would involve the sort of subjective judgment for which—Intervenors-Plaintiffs claim—rulemaking is required.

Palm said nothing suggesting that DHS may act directly only on a "blanket" basis—closing *all* schools or forbidding *all* public gatherings—but go through onerous rulemaking for more limited applications of the law.

Indeed, the school closures upheld in Safer at Home unquestionably involved discretionary judgment: the Order set a temporal limit on the school closures ("the remainder of the 2019–2020 school year"), provided that schools could continue to provide "distance learning or virtual learning," and could still be used "for Essential Government Functions and food distribution."[30]

Intervenors-Plaintiffs overlook that it is the COVID-19 virus *itself* that determines how COVID-19 spreads, and accordingly, what gatherings of the public are the conducive to that spread. Put differently, DHS is reacting to the virus. As DHS is tasked to forbid gatherings of the public to "control outbreaks and epidemics," of course it needs to apply the law in a way that addresses the epidemiological facts on the ground. This is simply how DHS applies the law to the specific situation at hand.

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[30] Safer at Home Order, *supra* n. 26, § 4.a.

5. Intervenors-Plaintiffs' reading of *Palm* would lead dangerous results. *Palm* did not leave DHS powerless to respond to public health crises.

Courts interpret statutes to avoid unreasonable results. An interpretation that an order forbidding public gatherings under Wis. Stat. § 252.02(3) alone requires rulemaking would be absurd, and dangerous in its absurdity. And indeed, contrary to the implication of Intervenor-Plaintiff's argument, the *Palm* court did not leave DHS wholly powerless to respond statewide.

According to Plaintiff-Intervenors' theory, despite the plain language of Wis. Stat. § 252.02(3), DHS would be *powerless* to forbid gatherings of the public in response to an Ebola outbreak, and would instead have to go through rulemaking procedures that unquestionably take *weeks*. The COVID-19 pandemic's recent escalation demonstrates the need for immediate action Risk levels, hospitalizations, and deaths, have increased rapidly.

Wisconsin Stat. § 252.02(3) recognizes the fact that communicable diseases do not abide by contemplative timeframes, and accordingly that DHS must have the ability to issue targeted responses—whether through closing schools or forbidding gatherings of the public—quickly. A contrary interpretation would be absurd, because if correct, DHS would not actually be able to "control outbreaks and epidemics" in accordance with its express statutory authority. Wis. Stat. § 252.02(3).

We interpret statutes in light of their purpose, and the plain purpose of Wis. Stat. § 252.02(3) is to give DHS a tool to *react* to control an outbreak or epidemic, quickly. DHS may act under the well-defined parameters of Wis. Stat. § 252.02(3) without undertaking rulemaking.

The circuit court properly recognized that Intervenor-Plaintiffs could not show a likelihood of success on the merits of their claim, and this Court should affirm the circuit court's denial of a temporary injunction.

CONCLUSION

This Court should affirm the circuit court's order denying the motion for a temporary injunction.

Dated this 29th day of October 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,561 words.

Dated this 29th day of October, 2020.

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BRIEF CERTIFICATION

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

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APPENDIX CERTIFICATION

I hereby certify that: I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy.

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